Supreme Court, U.S.
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No. 99-1555

IN THE

Supreme Court of the United States

JOYCE BICKERSTAFF,

Petitioner,

v.

VASSAR COLLEGE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should review the determination of the courts below that petitioner failed to present evidence from which a finder of fact could determine that she was the victim of discrimination.

RULE 29.6 STATEMENT

Respondent Vassar College is an educational corporation; it has no parent corporation and issues no stock.

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BRIEF IN OPPOSITION

Respondent Vassar College ("Vassar") respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the decision of the United States Court of Appeals for the Second Circuit in this case.

INTRODUCTION

Petitioner Joyce Bickerstaff ("Bickerstaff") brought this action under Title VII alleging that Vassar's denial of petitioner's application for promotion to full professor constituted discrimination on the basis of gender and race.[1] The

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[1] Claims under other statutes were also filed but are no longer at issue in the case. *See* Pet. at 4 n.1. We therefore do not discuss them in this Opposition.

District Court granted Vassar's motion for summary judgment, holding that on the evidence presented no reasonable jury could find Vassar's stated reasons for denying petitioner's promotion to be pretextual. Pet. App. 45a.

On appeal to the Second Circuit, petitioner asserted that the district court "overlooked and misconstrued a vast array of evidence establishing genuine issues of material fact as to whether race and sex were motivating factors in Vassar's decision to deny her promotion to full professor." *Id.* at 13a. After a thorough review of the evidence offered by petitioner, the Second Circuit agreed with the District Court that no rational finder of fact could find Vassar's reasons for denying promotion were false:

> [B]ickerstaff has not presented evidence that an illegal discriminatory motive played a motivating role in Vassar's decision to deny her promotion. Instead, the evidence overwhelmingly supports Vassar's explanation that it denied Bickerstaff promotion for the legitimate, non-discriminatory reason that she did not satisfy the criteria for promotion. [*Id.* at 38a.]

Nothing in the petition offers any reason for this Court to review the factbound decisions of the courts below. As the opinion of the Second Circuit makes plain, petitioner's complaint concerns nothing more than the application of settled law to the facts of this case. Although the petition also purports to rely on a circuit conflict, the issue discussed in the cases identified by petitioner is not at all pertinent to this case. The petition should be denied.

COUNTERSTATEMENT

Vassar College is a private educational institution, chartered in 1863, and located in Poughkeepsie, New York. Petitioner, an African-American woman, was hired by Vassar as a lecturer in 1971, and placed on a tenure-track position in 1972. Petitioner's appointment was a "joint appointment," whereby her duties were split between the Africana Studies Program and the Education Department. In 1978, Vassar

promoted petitioner to the rank of Associate Professor and granted her tenure.

In 1989, petitioner applied for promotion to full professor; her application was denied. No appeal to either the New York State Division of Human Rights or the EEOC (nor, indeed, any litigation) ensued. Pet. App. 3a. In 1994, petitioner again applied for promotion, and was again denied. *Id.* It was that denial which formed the basis for this lawsuit. Between the 1989 denial and her re-application for promotion in 1994, petitioner had produced no scholarly articles for publication. *Id.*

The promotional review process at Vassar. Vassar's procedures for promotion are established in its bylaws and set forth in its Faculty Handbook. In discussing the requirements for promotion to the rank of full professor, the Faculty Handbook states:

> [C]ontinued demonstration of sound scholarship or significant artistic activity, and teaching of a high quality will be required. It is necessary that marked distinction will have been reached in scholarship or teaching, preferably in both.
>
> An additional important consideration will be academic leadership, which may be evidenced by participation in professional activities outside the College, service on committees within the College, or contributions to educational innovation or policy making at both the departmental and college levels. [Pet. App. 3a-4a.]

For a candidate on joint appointment, such as petitioner, promotion entails a "diffusive process that involves several steps and multiple recommenders." *Id.* at 4a.. In the case of a joint appointment, the procedures "are designed to accommodate recommendations from both the department and the program." *Id.* at 5a. The promotional review process at Vassar involves a number of decision-makers from various communities at the College, departmental and program colleagues; administrators and students. In the main, the recommendations are not made by the College's administra-

tion, but by members of the faculty who are the applicant's peers.

Student views on an applicant are gathered primarily from student evaluations known as "Course Evaluation Questionnaires" or "CEQs." In completing CEQs, students respond to questions by providing a numerical designation on a scale from one to five, in ascendant order based upon excellence. Pet. App. 42a. at nn.3, 4. In addition to CEQs, the College considers (if available) departmental committee reports and a report from the Student Advisory Committee ("SAC").

Petitioner's 1994-1995 application for promotion. At the time of the petitioner's application for promotion to full professor in 1994-1995, she was not competing "head to head" against any other candidate with a joint appointment in either Africana Studies or Education. During the 1994-1995 academic year, eight associate professors were considered for promotion to full professor; six were successful. Five of the six successful candidates were women. Pet. App. 10a.-11a.

The teaching credentials of the successful candidates were variously described by the decision makers as "consistently high teaching evaluations"; "taken as a whole, a strong teaching record by a dedicated, vigorous and talented teacher"; a teaching record described as "extraordinary", with 82% responses in category "5" on the "overall effectiveness" question; a "distinguished, and not just very strong, teacher record"; and "high quality" or "distinguished" teaching. None of the successful candidates received negative recommendations from the college-wide Faculty Appointments and Salary Committee ("FASC"), SAC, or the Dean. Court of Appeals Joint Appendix ("JA") at JA1473-1478.

Both of the unsuccessful candidates for full professor in 1994-1995 received negative recommendations from FASC, the Dean, and SAC. JA20; JA1487. Both had generally positive outside evaluations (which do not comment on teaching) and a positive recommendation at the departmental or program level.

In petitioner's case, the SAC—which is charged with reviewing and analyzing CEQs and issuing its analysis and recommendation on promotional applications—issued by a vote of 5-0 (with one abstention) its report "strongly recommend[ing] * * * that Ms. Bickerstaff not be promoted to full professor at this time. In fact, SAC is so concerned at Ms. Bickerstaff's performance that it feels her present status as an associate professor deserves re-examination by the College." Pet. App. 55a. SAC also found petitioner's recent CEQs "remarkably low," and in "a steady decline." *Id.* at 54a.

Although its overall recommendation was positive, the Africana Studies departmental committee also articulated a concern over petitioner's teaching record:

> [I]n terms of classroom teaching at Vassar, we do find problems reflected in her course evaluations which show a decidedly mixed reaction to her teaching. We do not know how to account adequately for her low CEQ ratings, especially since her syllabi project sound thoughtfully organized courses. * * * We urge that Bickerstaff refocus and reinvigorate her efforts in the classroom. [JA1288.]

In an Addendum to its original report, the Africana Studies committee stated that it "[r]ecognizes the mixed record of [petitioner's] student ratings." *Id.* at JA1292; *see also* Pet. App. 9a. The Addendum also acknowledged that the pattern in petitioner's CEQs has been one of marked, recent decline, noting that "since 1988 and her last review of promotion, we see a pattern of decline in course ratings, which become more precipitous in the last two years, 1992-1994." *Id.*

The Education Department committee also found that petitioner's teaching fell short of marked distinction "by a rather wide margin." Pet. App. 7a. Its Report comments that:

> [C]areful examination of the data from the evaluations reveal that the majority of responses fall into the 3 and 4 categories and of late an increasingly large percentage in the 2 category. These ratings would place Ms. Bicker-

> staff considerably lower than what would be expected of a faculty member at Vassar in order to receive a marked distinction in teaching. In addition, as a member of an education department one is faced with the additional demand of serving as a role model for students in all courses. Thus, the presentation of material (the teaching strategies used to disseminate course content) is as important as the content itself in order for one to have credibility with students. [JA1290.]

The report recommends against promotion to full professor. JA1281.

Considering the reviews of the SAC as well as the departmental committees, the members of the FASC "agreed unanimously that [petitioner] did not meet the stated criteria for promotion." JA1322. In commenting on petitioner's CEQs, FASC observed that

> the overall ratings since 1992 are dismally low, among the very worst that we on FASC have seen. To take just one comparative indicator: of the 30 course evaluations available, nine of the 30 have a combined score of 70% (4's and 5's combined) for question #8, Course Effectiveness; and only ten of the 30 have a combined score of 70% (4's and 5's combined) for question #9, teacher effectiveness. Very poor results are recorded for both large and small classes, for classes taught once or several times, for classes in both Education and Africana Studies, and for classes taught in her areas of specialization and outside of it. [*Id.*]

Similarly, the Acting Dean of the College recommended against promoting Bickerstaff, citing the absence of the required criteria for teaching, and commenting that petitioner's "teaching evaluations are among the poorest [he has] seen in a promotional review for full professor." JA21.

The District Court's Decision. The District Court granted summary judgment to Vassar. Pet. App. 59a. The court reviewed and applied the relevant standards on a motion for

summary judgment, *id.* at 51a, as well as the decisions of this Court (and the Second Circuit) on the availability of summary judgment in Title VII cases. *Id.* 47-50a.[2]

The District Court assumed that Bickerstaff had presented a prima facie case of discrimination, and also accepted Vassar's statement of its legitimate non-discriminatory reason for denial—that appellant simply was not qualified for promotion. Pet. App. 50a. The court therefore turned to consideration of whether petitioner could show that the proffered reason "is false and a pretext for discrimination." *Id.* Reviewing the evidence, the District Court concluded that "the evidence of discrimination on the part of Vassar College that has been proffered by Dr. Bickerstaff is not sufficient to survive this motion for summary judgment." *Id.* at 51a. Although it was concerned that that "most of the published criteria" for promotion enumerated by Vassar were subjective in nature, the court held that the appellant's poor CEQs constituted an "actual objective record" on which Vassar has a right to rely, *id.* at 57a, in denying promotion. "On the totality of the evidence," the court concluded, " no reasonable juror could find that the stated grounds for the decision were pretextual." *Id.*

The Second Circuit's Decision. Like the District Court before it, the Second Circuit set out the settled standards for summary judgment in an employment discrimination case as articulated by this Court in decisions such as *McDonnell Douglas* and *St. Mary's Honor Center* v. *Hicks*, 509 U.S. 502 (1993). Pet. App. 15a. It noted that "the central question presented on this appeal is whether Bickerstaff has presented

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[2] Petitioner argues that the District Court's purported "puzzlement concerning the state of the law with respect to summary judgment" is a reason to grant review. Pet. at 17. The court's colorful reference to "a yo-yo rule about the shifting burden of persuasion in employment discrimination cases" was nothing more than a reference to the settled rule of *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), *see* Pet. App. 47a & n.1, and does not demonstrate any "puzzlement," let alone a reason to grant certiorari.

sufficient admissible evidence from which a rational finder of fact could infer that more likely than not she was the victim of intentional discrimination." *Id.* at 18a.

The Second Circuit assumed that petitioner had made out a prima facie case and found that Vassar had met its burden to articulate legitimate non-discriminatory reasons for its decision to deny her promotion. The court then proceeded to evaluate the various proof proffered by Bickerstaff to demonstrate discrimination. It affirmed the District Court's determination that petitioner's statistical evidence was flawed and therefore not admissible. *Id.* at 24a. It rejected the allegation that one student "poisoned" the SAC summary of petitioner's poor CEQs because the statements attributed to the student at issue did not indicate race bias and because the SAC report was in any event based on petitioner's admittedly poor CEQs. It noted that "in varying degrees, at least five levels of Vassar decision makers expressed the same concern over Bickerstaff's CEQ's." *Id.* at 27a.

The Court also examined an affidavit by a sympathetic colleague in the Africana Studies Department, and found it bereft of any "concrete particulars" regarding racial animus. *Id.* at 28a-29a. It similarly found that a remark attributed to the Chair of the Education Department—to the effect it would be a "crime" if petitioner were to make full professor—was not evidence of race discrimination because it contained no linkage to race bias. *Id.* at 29a-30a. The Second Circuit likewise found no evidence that Vassar's decision not to follow the recommendation of an outside evaluator was tainted by racial bias but rather rested on the fact that the evaluator did not assess petitioner under Vassar's posted criteria for promotion. *Id.* at 32a.

The court of appeals found the allegedly "unprecedented" appointment of two "ad hoc" committees to review petitioner's candidacy neither unprecedented nor irregular, since Vassar's Faculty Handbook specified that its promotional "procedures are designed to accommodate recommendations from both [the] department and program." *Id.* at 33a.

Finally, the court rejected any claim that CEQs were unfairly emphasized in evaluating her teaching ability, because (a) petitioner admitted at her deposition "that Vassar relies almost exclusively on CEQ's in evaluating teachers"; (b) petitioner herself authored a recommendation against tenure for an African-American woman with a joint appointment, relying considerably on CEQs in evaluating that candidate's teaching; (c) the numerous promotional materials in the record overwhelmingly established candidates for promotion had their teaching skills assessed by CEQs. *Id.* at 35a-38a.

REASONS FOR DENYING THE WRIT

I. THE PETITION COMPLAINS ONLY OF THE APPLICATION OF SETTLED LAW TO THE FACTS OF THIS CASE

The errors asserted in the petition are simply allegations of factual error or of misapplication of settled law to the facts and are not appropriate for this Court's review. *See* S. Ct. Rule 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

As is evident from a review of the Second Circuit's decision, in the courts below this case turned on the factually-focused question "whether Bickerstaff has presented sufficient admissible evidence from which a rational finder of fact could infer" that she was the victim of discrimination. Pet. App. 18a. In considering that question, the Court of Appeals first set forth settled law concerning summary judgment under the burden shifting framework of *McDonnell Douglas*. *Id.* at 15a. It made no mention of any disputed legal issue or circuit conflict, but simply recited the appropriate legal analysis. It did not discuss or reject any proposition of law on which Bickerstaff had based her appeal, and for good reason: as noted, her appeal was based simply on her con-

tention that summary judgment was not appropriate on these facts under undisputed principles of law.[3]

Having articulated the appropriate and settled standards, the Second Circuit then undertook to review—in great detail—each piece of evidence on which Bickerstaff relied for her contention that summary judgment should not have been granted. *See* Pet. App. 20a-41a. Like the District Court before it, the Second Circuit found no evidence that the reason advanced by Vassar for declining to promote petitioner was false or pretextual, and it therefore affirmed the judgment of the District Court. *Id.* at 42a.

While petitioner obviously disagrees with the conclusions of the courts below concerning the failure of her evidence to defeat summary judgment, *see* Pet. 17 ("Surely, the evidence here merited a trial by jury."), that disagreement provides no basis for this Court's intervention.

II. THIS CASE PROVIDES NO OPPORTUNITY TO RESOLVE THE PURPORTED CONFLICT DISCUSSED IN THE PETITION

Petitioner argues that certiorari should be granted to "revisit the standards of proof required in a discrimination case under Title VII after *St. Mary's Honor Center* v. *Hicks*, 509 U.S. 502 (1993), with respect to the sufficiency of evidence required by the non-moving party for summary judgment." Pet. at 12. In particular, she seeks to have this Court review an issue which she contends has divided the lower courts: whether, under *Hicks*, a plaintiff can always avoid summary judgment by creating a genuine issue concerning whether the employer's stated decision for the employment decision is false. *See Aka* v. *Washington Hospital Center*, 156 F.3d 1284, 1289-1290 (D.C. Cir. 1998).

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[3] Indeed, the Petition itself appears to concede that the Second Circuit applied settled law on summary judgment, noting that "the court began its review with obeisance to the rule that all ambiguities and all reasonable factual inferences should be drawn in favor of the nonmovant." Pet. at 9.

The record in this case, however, will not present the Court with an opportunity to resolve that question, even if it were otherwise appropriate for an exercise of the Court's jurisdiction, because there is no contention here that Vassar's stated reasons for rejecting petitioner's bid for a promotion were false. Both the courts below assumed that petitioner had met her burden to demonstrate a prima facie case and found that Vassar had met "its burden of production by proffering admissible evidence of a legitimate, nondiscriminatory reason for denying Bickerstaff promotion to full professor." Pet. App. 18a. Bickerstaff did not attack this statement of reasons as false or pretextual; she simply responded with (inadequate) evidence designed to meet her ultimate burden of persuasion.

The Second Circuit in this case therefore was not presented with the issue discussed in the cases on which petitioner relies. In fact, in each of those cases where the court of appeals ruled in favor of the employee, the court had found the existence of issues of fact regarding the falsity of the employer's statement of reasons for the challenged action. In *Sheridan* v. *E.I. DuPont de Nemours*, 100 F.3d 1061 (2d Cir. 1996), *cert. denied*, 521 U.S. 1129 (1997), the Third Circuit sustained a jury's determination that the employer's proffered reason was pretextual; in *Kline* v. *Tennessee Valley Authority*, 128 F.3d 337 (6th Cir. 1997), the Sixth Circuit affirmed a trial court's disbelief of the employer's proffered reason for not selecting the employee; in *Washington* v. *Garrett*, 10 F.3d 1421 (3d Cir. 1993), the Ninth Circuit rejected the Government's asserted reason for abolition of the position; and in *Randle* v. *City of Aurora*, 69 F.3d 441 (10th Cir. 1995), a genuine issue of fact was found to exist on the failure to promote and race discrimination claims.

Because the employees in these cases submitted evidence sufficient to permit a finding that the employers' proffered reasons were not the real reason for the adverse employment action, these courts have been required to decide whether such evidence alone is always sufficient to defeat summary judgment. *See Aka* v. *Washington Hospital Center*, 156 F.3d

1284 (D.C. Cir. 1998) (discussing issue whether plaintiff can always succeed "in fending off summary judgment if he can demonstrate a genuine issue of material fact as to whether the employer's stated reason for its employment reason is the real reason.") The issue does not arise where, as here, the employee is unable to offer evidence of falsity but simply responds with what she views as evidence of discrimination.

At the end of the day, petitioner simply seeks a further review of the facts by this Court. The Court should, accordingly, decline to exercise jurisdiction and deny the petition.

CONCLUSION

For all the foregoing reasons, the petition should be denied.

Respectfully submitted,

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